1971

Stanley Title Company v. The Continental Bank and Trust Company : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STANLEY TITLE COMPANY,
a corporation, *Plaintiff and Appellant,*

vs.

THE CONTINENTAL BANK AND TRUST COMPANY,
a corporation,
Defendant and Respondent.

Case No. 12271

BRIEF OF APPELLANT

Appeal from District Court of Salt Lake County, Utah
Honorable James S. Sawaya, Judge

GEORGE B. STANLEY
154 North Main Street
Heber, Utah, 84032
ATTORNEY FOR APPELLANT

FABIAN & CLENDENIN
Albert J. Colton
800 Continental Bank Building
Salt Lake City, Utah
ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Complaint in equity to set aside judgment void on its face for want of due process of law under the Constitution of the United States and the Constitution of the State of Utah.

DISPOSITION IN LOWER COURT

By pleading entitled "Motion to Dismiss" the lower court entered an "ORDER" granting judgment on the pleadings and summary judgment, and dismissed the action with prejudice.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order directing the lower court to vacate its order granting judgment on the pleadings and summary judgment, and dismissing the complaint with prejudice, and that the motion to dismiss be denied and the respondent required to answer or otherwise plead to said complaint.

STATEMENT OF FACTS

This case is the outgrowth of a case which has been before this Supreme Court, entitled W. P. HARLIN CONSTRUCTION COMPANY vs. CONTINENTAL BANK & TRUST COMPAY, et al., being case No. 169179 in the Third Judicial District Court in and for Salt Lake County, and case No. 11504 in this Supreme Court, and the files and records in said Case No. 11504 have been made a part of the cause of action in the present action and are before this Supreme Court on this appeal in their entirety. (Rec. 25-27). The case is reported in 23 Utah 2d 422, 464 P.2d 585 (1970). The complaint in said case No. 169179 was filed December 21, 1966. Judgment was entered in said case No. 169179 on January 16, 1969, on the main case, but no

judgment was entered on the cross claim of Continental Bank. (Rec. 189 in case No. 11504).

On January 22, 1970, the Utah Supreme Court affirmed the judgment entered by Harlan Construction Company on its complaint, and also on the judgment on the cross-claim which had never been entered and and was not before the court. (23 Utah 2d 422) (464 P.2d 589).

On February 26, 1970, Continental on ex parte application and without notice to Stanley Title Company obtained a judgment of the District Court for $11,-082.60 against the cross defendant Stanley Title Company (Rec. 11-12)

On July 2nd, 1970, the present action subject of this appeal was filed, the complaint being in equity and to it were attached Exhibits A, B, C, and D, seeking to set aside the judgment entered on February 26, 1970, as against Stanley Title Company. (Rec. 1-14).

On July 13th, 1970, Continental filed a "MOTION TO DISMISS" (Rec. 15).

On August 14th, 1970, the motion to dismiss was heard, and the minute entry reads as follows:

> THE DEFENDANTS MOTION TO DISMISS COMES NOW ON AND BEFORE THE COURT FOR HEARING, GEORGE STANLEY APPEARING ON BEHALF OF THE PLAINTIFF AS COUNSEL. ALBERT COLTON APPEARING ON BEHALF OF THE DEFENDANT AS

COUNSEL. WHEREUPON THE DEFENDANTS MOTION TO DISMISS IS ARGUED TO THE COURT BY RESPECTIVE COUNSEL AND THE MATTER IS SUBMITTED. THEREUPON THE COURT GRANTS THE MOTION TO DISMISS. (Rec. 31)

On September 1, 1970, an "ORDER" was entered (Rec. 20-22) which reads as follows:

> Defendant's Motion to Dismiss coming on for hearing before The Honorable James Sawaya on Friday, August 14, 1970; plaintiff being represented by George Stanley, Esq. and defendant by Albert J. Colton of Fabian & Clendenin, and argument being heard, and the Court having considered the pleadings, the entire file in W. P. Harlin Construction Company vs. The Continental Bank & Trust Company, et al., Civil No. 269179, in the District Court of Salt Lake County, and the stipulated fact that the records of the Secretary of State show that effective September 30, 1967, plaintiff was suspended by the State Tax Commission of the State of Utah pursuant to the provisions of Section 59-13-61, U.C.A. 1953, and that the last annual report required by Section 16-10-121, U.C.A. 1953 was filed by plaintiff with the Secretary of State on March 6, 1868, and the Court, therefore, pursuant to Rule 12(c), Utah Rules of Civil Procedure, having treated defendant's motion as one for summary judgment, and no facts being in dispute, and good cause appearing therefor;
>
> It is hereby ORDERED:
>
> That plaintiff's complaint be and hereby is dismised with prejudice.

ATTEST:

W. STERLING EVANS
CLERK

By Byron Stark
Deputy Clerk

BY THE COURT:
James S. Sawaya
Judge.

Other than the above listed documents, there are no exhibits, motions, affidavits, or other matters in the files to sustain the motion of the defendant which was granted.

Notice of appeal was filed September 29, 1970 (Rec. 24)

ARGUMENT

POINT I.

THE PROVISION OF THE "ORDER" APPEALED FROM RELATING TO RULE 12(c) UTAH RULES OF CIVIL PROCEDURE, IS WITHOUT DUE PROCESS OF LAW AND VOID FOR THE REASON THAT THE PROVISIONS OF SAID RULE 12(c) HAVE NOT BEEN COMPLIED WITH.

RULE 12(c) of the Utah Rules of Civil Procedure reads as follows:

> (c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such

> time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

No motion for judgment on the pleadings has been filed.

No answer is in the files or records, and hence the pleadings were not closed.

No exhibits, stipulations or affidavits appear in the record.

The minute record of the court (Rec. 31) mentions no motion for judgment on the pleadings.

In view of the record there was no motion made under Rule 12(c), and none was considered. In this respect the order is void for want of jurisdiction

POINT II.

THE PROVISION OF THE "ORDER" (Rec. 20-22) APPEALED FROM RELATING TO SUMMARY JUDGMENT, IS WITHOUT DUE PROCESS OF LAW AND VOID FOR THE REASON THAT THE PROVISIONS OF RULE 56, UTAH RULES OF CIVIL PROCEDURE, HAVE NOT BEEN COMPLIED WITH.

Rule 56(c), supra, reads as follows:

> (c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The case of Christensen v. Financial Service Co., 14 Utah 2d 101, 377 P2d 1010, a case on summary judgment, has this to say:

> Summary judgment can properly be granted under Rule 56 only if "the pleadings, depositions, and admissions on file, together with the affidavits, if any," which are offered, show without dispute that the party is entitled to prevail. This condition is obviously not met if the allegations of the plaintiff's complaint stand in opposition to the averments of the affidavits so that there are controverted issues of fact, the determination of which is necessary to settle the rights of the parties. The trial judge correctly ruled that there were such issues of fact here. The cases relied upon by the defendant are distinguishable, since an admittedly different situation exists where the averments in the affidavits or facts shown by depositions and/or exhibits would undisputably resolve the material facts. Continental Bank & Trust Co. v. Cunningham, 10 Utah 2d 329, 353 P2d 168 .

No motion for summary judgment is in the files.

No answer, exhibits, stipulations nor affidavits appear in the record, nor any other pleading or writing to set forth any facts or other matters upon which defendant relies for summary judgment.

In view of the record there was no motion under Rule 56 for summary judgment and none was considered. In this respect the "ORDER" was without due process of law, and is void for want of jurisdiction.

POINT III.

THE STATEMENTS OF THE "ORDER" (Rec. 20-22) CONCERNING THE PROVISIONS OF SECTION 59-13-61 U.C.A. 1953, AND SECTION 16-10-121, U.C.A. 1953, DO NOT BAR PLAINTIFF FROM BRINGING THIS ACTION AND MAINTAINING IT.

The record shows no stipulated facts, or that any stipulations were made as to facts. The "Motion to Dismiss" reads in part as follows:

> 2. Plaintiff corporation was a Utah corporation. Its franchise was suspended in 1967 for failure to pay taxes, and it has failed to file an annual report since 1968.
>
> Pursuant to # 59-13-61 UCA 1953 upon nonpayment of taxes by a Utah corporation, all of its corporate powers, rights and privileges are suspended and such plaintiff is barred from bringing this action.

This Point 2 cannot be considered on the "Motion to Dismiss" as it is a matter of defense that cannot be heard by motion. Rule 12(b) of the Rules of Civil Procedure, states in part as follows:

> (b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted * * *.

The other provisions of the rule which may be taken by motion go to jurisdiction, venue, process and failure to join an indispensable party. There is no provision that the matters in said paragraph 2 above can be made part of a motion to dismiss.

There are no writings, exhibits, certificates of state officers, or any other matters in the record to support said paragraph 2 above set forth. Even if the facts alleged in said paragraph 2 were true, which is not admitted by appellant, it would be of no consequence as Section 16-10-101, in Replacement Volume 2, Utah Code Annotated 1953, provides as follows:

> CONTINUATION OF CORPORATE EXISTENCE TO WIND UP AFTER DISSOLUTION—Notwithstanding the dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the secretary of state, or (2) by a decree of court, or (3) by expiration

> of its period of duration, the corporate existence of such corporation shall nevertheless continue for the purpose of winding up its affairs in respect to any property and assets which have not been distributed or otherwise disposed of prior to such dissolution, and to effect such purpose may sell or otherwise dispose of such property and assets, sue and be sued, contract, and exercise all other incidental and necessary powers.

It appears that Continental in the present suit is relying upon the forfeiture of the charter of Stanley Title Company as its basis for dismissal of the action. Section 59-13-61, U C.A. 1953, reads as follows:

> FAILURE TO PAY TAX—SUSPENSION OR FORFEITURE OF CORPORATE RIGHTS.—If a tax computed and levied hereunder is not paid before 5 o'clock p.m. on the last day of the eleventh month after the date of delinquency the corporate powers, rights and privileges of the delinquent taxpayer, if it is a domestic corporation, shall be suspended, and if a foreign corporation, it shall thereupon forfeit its rights to do intrastate business in the state. The tax commission shall transmit the name of each such corporation to the secretary of state, who shall immediately record the same in such manner that it may be available to the public. The suspension or forfeiture herein provided for shall become effective from the time such record is made, and the certificate of the secretary of state shall be prima facie evidence of such suspension or forfeiture.

The record shows that the cross claim made in civil action No. 169179 by Continental against Stanley Title

Company was filed January 13, 1967. The "Order" (Rec. 20-22) which is the subject to this appeal alleges that the charter of Stanley Title Company was not suspended until September 30, 1967. From the face of the record the present action was commenced before the charter was suspended.

The closest case in point is that of Prudential Fed. S. & L. Ass'n. v. Hartford Acc. & Ind. Co., 7 Utah 2d 366, 325 P.2d 899, at pages 904 and 905, states of foreign corporations:

> It is noteworthy that Sec. 59-13-61 does not spell out any disability of corporations so disenfranchisen as to sue as does Sec. 16-8-3, quoted above, relating to failure to qualify.
>
> (9) We have found no case dealing precisely with the question posed. But this court has held that the bringing of one suit by a foreign corporation to protect its rights does not constitute "doing business" within the state, and that before the acts of a foreign corporation "could properly be classified as doing business within the State, it would have to be shown that there was some degree of continuity or regularity of such acts, coupled with some other manner of entering into direct business transactions with others." The logical conclusion from such holdings is that 59-13-61 would not prevent Felt from bringing suit to enforce the rights growing out of business transacted while it was franchised here, even though its franchise had been revoked, because the bringing of one suit under such circumstances would not be doing "intrastate business" within the meaning of that section.

If a foreign corporation is allowed to sue and be sued even though its rights have been forfeited to do intrastate business in this state, it cannot be said that a domestic corporation whose rights to do business have not been so forfeited, cannot sue and be sued under Section 59-13-61 in the light of the last above case. Furthermore, Section 59-13-63 provides "Relief in case of suspension or forfeiture." There is no allegation that such relief has not been obtained by the plaintiff. Even though proper pleading, it would be faulty in that respect.

It is contended by appellant that from the facts alleged in the Motion to Dismiss (Rec. 15-16) pertaining to the right of Stanley Title Company to do business are not proper matters to be considered on such motion, that such facts are matters of defense by answer, there are no evidentiary matters in the record to support such facts, and appellant has a right to a defense to any such facts before a ruling can be made thereon.

POINT IV.

THE COMPLAINT AND ITS EXHIBITS (Rec. 1-14) ALLEGE A CAUSE OF ACTION AND FACTS WHICH STATE A CLAIM AGAINST DEFENDANT UPON WHICH RELIEF MAY BE GRANTED.

RULE 60(b) of the UTAH RULES OF CIVIL PROCEDURE provides:

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * * (5) the judgment is void; * * * * The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceedings was entered or taken. * * This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

It is to be noted that the complaint (Rec. 1-14) is based upon facts which are shown on the face of the record itself. These facts as alleged show the following:

1. The Cross Claim (Rec. 7-8) is contingent on the outcome of the original action and does not state an existing cause of action.

2. The Cross Claim was dismissed and abandoned by Continental (Exhibit D, Rec. 14).

3. No trial was held on the Cross Claim (Rec. 2).

4. The lower court did not mention the cross claim during the entire proceeding (Rec. 2).

5. No findings of fact, conclusions of law nor judg-

ments were filed in Civil Action No. 169179, which were made or filed by the cross-claimant, Continental.

6. The judgment of February 26th, 1970 (Rec. 11-13) was based upon a conclusion of law in the conclusions of Harlin Construction Company, plaintiff in the main action, and Harlin Construction Company was not a party to the cross claim.

7. The judgment in favor of Harlin Construction Company has been fully paid.

From the above allegations, appellant submits that the complaint does state facts which constitute a claim against defendant. No other question is involved in the motion to dismiss.

In the case of Liquor Control Commission v. Athas, 243 P.2d 441, this Supreme Court said:

> Where the complaint states a claim in general language but is not sufficiently definite in certain respects to enable defendant to answer, the remedy is a motion for a more definite statement, not a motion to dismiss. Porter v. Karavas, 10 Cir. 157 F.2d 984.
>
> Under the Rules of Civil Procedure, a claim upon which relief may be granted can be pleaded by the recitation of conclusions of law or fact or both. Mails v. Kansas City Public Service Co., D.C., 51 F. Supp. 562; 1 Barron and Holtzoff, Federal Practice and Procedure, Rules Ed. 22 Am. Bar Assn. Jul. 447.

In the case of Bowen v. Olson, 122 Utah 66, 246 P.2d 602, the court was considering the vacating of a

judgment entered more than three years prior to the commencement of the action. This court said:

> This court made it clear that the remedy by the statute is not exclusive and that a suit in equity to set aside a judgment for fraud in its procurement may be brought after the time limited in the statute for a motion to set aside a judgment. Rule 60(b), URCP, supersedes and is substantially the same as Sec. 104-14-4, U.C.A. 1943. The Rule specifically provides that it "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court."
>
> * * * *
>
> As stated in Butler v. McKey, 9 Cir., 138 F.2d 373, 376, "It is a basic rule that a judgment is void and subject to collateral attack if a lack of jurisdiction in the court appears on the face of the record."

POINT V.

THE CROSS CLAIM OF CONTINENTAL BANK IN THE ORIGINAL ACTION 169179 WAS DISMISSED AND ABANDONED.

The original Cross Claim reads as follows: (Rec. 7-8):

> As a cross claim against defendant Stanley Title Company, defendant, The Continental Bank and Trust Company alleges:
>
> 1. On or about September 6, 1966, the proceeds of the check, a copy of which is identified as

Exhibit A to the complaint, were paid by this defendant to defendant Stanley Title Company.

2. Plaintiff claims said proceeds were wrongfully paid by this defendant to the defendant Stanley Title Company.

3. If plaintiff recovers judgment against The Continental Bank and Trust Company by reason of such payment, Stanley Title Company has been unjustly enriched thereby and The Continental Bank and Trust Company is entitled to recover the amount of any judgment by plaintiff against it from defendant Stanley Title Company.

WHEREFORE, The Continental Bank and Trust Company prays:

1. That plaintiff take nothing by its complaint.

2. That if plaintiff recover judgment against it, The Continental National Bank and Trust Company have judgment against Stanley Title Company in such amount as the court may award plaintiff against The Continental Bank and Trust Company.

3. For its costs in this action and such other relief as the court may deem appropriate in the circumstances.

Dated this 12th day of January, 1967.

Peter W. Billings
Fabian & Clendenin
800 Continental Bank Building
Salt Lake City, Utah
Attorneys for Defendant
The Continental Bank and Trust Company

In examining the "ANSWER AND CROSS CLAIM OF THE CONTINENTAL BANK AND

TRUST COMPANY" (Rec. 5-8) the entire document is only one document and is a commingling of the Answer with the Cross Claim. They constitute one pleading. The prayer is one prayer. The plaintiff is not made a party to the Cross Claim.

In 41 Am. Jur., pages 473-474, the following is said:

> "257. REQUISITES; SUFFICIENCY. — A cross complaint or cross petition is in the nature of an original complaint or petition and must contain allegations that would be essential to an original complaint or petition purporting to set up the cause of action stated in the cross complaint or cross petition, and unless it avers all facts essential to a statement of a cause of action, it is subject to demurrer. When its sufficiency is challenged it must appear, either expressly or by implication, that the facts necessary to entitle the pleader to relief are stated. It should also state facts essential to show that the demand stated is a proper subject of a cross action.
>
> * * * *
>
> "258. NATURE OF PROCEEDING. On the filing of the cross complaint the same proceedings may be had as on the original complaint. It is in itself a distinct and independent cause of action, of which the court properly intervened and stated the defendant's position, in respect of the matters pleaded by him, as actor, and there are thereupon mutual actions pending between the same parties, each as at the same time both a plaintiff and a defendant. The issues presented by a cross complaint and answer are distinct and separate from the issues presented by the original complaint and answer

It is to be noted that in the Answer and Cross Claim, there is no allegation that Continental Bank has sustained any damage or suffered any loss. No loss is pleaded.

In the case of Greene et al. v. Knox et al., Adams v. Continental Nat. Bank, 71 Utah 217, 263 P. 928, one Adams cross-claimed against Continental Bank for any loss which might in the future be sustained by Adams on an indemnity agremeent for loss upon bonds signed by Adams to benefit the bank. This Supreme Court said:

> Independent of the foregoing, the demurrer to the cross-complaint was properly sustained for lack of an averment that appellant had sustained any loss or injury by reason of the execution of the bond. Appellant's answer to the plaintiff's complaint, which was made a part of his cross-complaint against the bank, denied any breach of the bond or liability to the plaintiff. It is certainly essential as a ground of recovery upon such a contract of indemnity to show a loss by the complaining party. In appellant's own brief when discussing the statute of limitations (a point not here urged by respondent), his counsel say:
>
> "Until the amount of Adams' liability on the bond is established, of course he cannot sue the bank. If he were never sued upon this bond, no cause of action could accrue to him as against the bank. When Adams is sued, he can demand that the security be applied according to the contract with the bank. But, until he has suffered damages, he has no cause of action against the bank."

After the plaintiff, Harlin Construction Company, had rested its case in No. 169179, supra, counsel for Continental Bank made this statement (EXHIBIT D, Rec. 14):

> MR. COLTON: If the Court please, I would like at this time to dismiss on behalf of the defendant, Continental Bank, on the basis of the testimony that has been admitted to date on behalf of plaintiff's case. The Court is aware the bank's position is a multiple one.
>
> First of all, of course, we see ourselves as a middleman. Resolution of course that that is if Mr. Harlin recovers against Mr. Stanley we would contend that we would, therefore, be entitled if he were to recover against us we would be entitled to cross claim against Mr. Stanley and recover from him or if indeed Mr. Stanley is successful in his defense, there would be no damage and we would be eliminated, of course. That I can see that particular defenses would depend on how the Court finds the facts at the end of the case.
>
> We still contend that the evidence now would show no liability on the part of Continental and this would be on the basis of plaintiff's own testimony uncontested without any question.

It is to be noted that the counsel for Continental asked for dismissal, first on the cross claim and then on the main case. No objection to the dismissal was made by Stanley Title Company.

In the case of Salt Lake City v. Utah Lake Farmers Association, 4 Utah 2d 14, 286 P.2d 773, this Supreme Court said at page 778 of the Pacific Reporter:

In Bach v. Quigan, D.C.N.Y. 1945, #F.R.D. 34, on page 36 the Court said:

> "This Court is in complete accord with the statement of defendant that the new Rules of Civil Procedure have displaced any 'archaic, obsolete and confining rules' which may previously have governed federal procedure and that they are designed for the swift and just disposition of legal disputes. However, it was never contemplated that any set of facts which might eventually constitute a 'claim upon which relief can be granted' should be interposed as a counterclaim to an action and it would not be an aid to the swift and just disposition of the matter to permit the issues to be confused by an uncertain claim, the substance of which is contingent upon the outcome of the principal action.
>
> " * * * * it is doubtful whether the alleged wrongful motive in instituting the action against defendant Quigan gives rise to a claim for malicious abuse of process * * * such a claim does not mature and no relief can be granted upon it until the merits of the principal action have been determined. * * "

Continental Bank's counsel supported the last quotation in his motion to dismiss which he made to the court, supra, in No. 169179, which on appeal was No. 11504, the full record of which is a part of this appeal (Rec. 169179, Transcript page 98, Record page 417).

In case No. 11504 in this Supreme Court, 23 Utah 2d 422, 464 P.2d 585 (1970), this Supreme Court the following order was made:

> And the same order is made as to the findings and judgment of Continental Bank on its cross-

complaint against George Stanley and Stanley Title Company.

Plaintiff, Stanley Title Company, in the instant case alleges in this connection:

1. There was no independent cause of action alleged by cross claim in Civil Action No. 169179, supra, which stated a cause of action in existence at the time of the filing of such cross claim. 41 Am. Jur., pages 473-474, #257, 258 supra.

2. There was no trial held on any cross claim.

Rule 52(a), Utah Rules of Civil Procedure, provides as follows:

> FINDINGS BY THE COURT
> (a) EFFECT. In all actions tried upon the facts without a jury, or with an advisory jury, the court shall, unless the same are waived, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

3. There were no findings of fact, nor conclusions of law filed by Continental Bank on its cross claim.

4. There was no judgment entered by Continental Bank on its cross claim.

5. This Supreme Court had nothnig before it on appeal on any judgment entered by Continental Bank.

6. The above judgment granted in favor of Continental Bank was void for want of jurisdiction, and for want of due process of law, under the Constitution of the United States and the Constitution of the State of Utah.

In the case of Woldberg v. Industrial Commission, 74 Utah 309, 279 P. 609, this Supreme Court said:

> We need not discuss or decide the legal effect of these matters for the reason that this court will inquire into its own jurisdiction however that question may be called to its attention. "We have no right to proceed to a decision of the merits on any case where the law forbids us the right to do so whether the parties desire it or not." McCashland v. Keogh, 32 Utah 11, 88 P. 680.

Appellant is not arguing the merits of the present case on appeal because the defendant and respondent has not yet answered the complaint, but appellant strongly urges that it is entitled to its day in court and a fair trial which it has not had.

CONCLUSION

The complaint (Rec. 1-14) states a claim upon which relief can be granted. It alleges facts which show on the face of the record that the judgment of February 26, 1970, (Rec. 11-13) was void for want of due process of law. The "Order" of September 1, 1970 (Rec. 20-22) should be vacated and set aside, and the trial Court ordered to deny the Motion to Dismiss (Rec. 15-16), and further order the defendant, Continental Bank, to answer or otherwise plead to the complaint.

Respectfully submitted,

George B. Stanley
Attorney for Appellant